No. 16-1466

IN THE
Supreme Court of the United States

MARK JANUS,
Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

AMICUS CURIAE BRIEF OF GREGORY J. HARTNETT, ELIZABETH M. GALASKA, ROBERT G. BROUGH, JR., AND JOHN M. CRESS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), should be overruled and public-sector agency fee arrangements declared unconstitutional under the First Amendment.

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae Gregory J. Hartnett ("Mr. Hartnett"), Elizabeth M. Galaska ("Ms. Galaska"), Robert G. Brough, Jr. ("Mr. Brough"), and John M. Cress ("Mr. Cress") (collectively, "Amici") are Pennsylvania public-school teachers who are represented by the Fairness Center in this matter. They have also filed their own lawsuit, which, like this matter, challenges the central holding in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and questions the constitutionality of so-called "fair share fees"[2] as a condition of employment for nonmember[3] public-sector employees. First Am. Compl. 2–5, *Hartnett v. PSEA*, No. 1:17-cv-00100-YK (M.D. Pa. Mar. 21, 2017), ECF No. 23.

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[1] All parties have consented to the filing of this brief through blanket consents filed with the Clerk of the Court. Pursuant to Rule 37.6, Amici affirm that no counsel for any party authored this brief in whole or in part, and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Amici Curiae or their counsel made a monetary contribution to its preparation or submission.

[2] Pennsylvania law defines a "fair share fee" as "the regular membership dues required of members of the exclusive representative less the cost for the previous fiscal year of its activities or undertakings which were not reasonably employed to implement or effectuate the duties of the employe organization as exclusive representative." 71 P.S. § 575(a). Hereinafter referred to in this brief as "compelled union fee" or some derivation thereof.

[3] "Nonmember" is defined in Pennsylvania law as "an employe of a public employer, who is not a member of the exclusive representative, but who is represented in a collective bargaining unit by the exclusive representative for purposes of collective bargaining." 71 P.S. § 575(a).

Amici joined with other individuals and organizations urging this Court to grant *certiorari* in this matter, Br. Amicus Curiae of Pac. Legal Found., et al., *Janus v. Am. Fed'n of State & Mun. Emps., Council 31*, No. 16-1466 (brief filed July 10, 2017), as this Court's disposition in this matter will almost certainly affect Amici's challenge to the central holding in *Abood* and clarify their First Amendment rights as nonmember public-sector employees.

As such, Amici offer this Court their unique and relevant perspectives as Pennsylvania public-school teachers who, as a result of this Court's ruling in *Abood*, are compelled as nonmembers to support unions' collective bargaining—and inherently political—positions with which they happen to disagree.

Amici urge this Court to overrule its holding in *Abood* and to declare compelled union fees unconstitutional and violative of nonmember public-sector employees' First Amendment rights.

SUMMARY OF ARGUMENT

Amici address two points in this brief. First, Amici personally attest to the reality that certain nonmember public-sector employees oppose their exclusive representatives'[4] position when bargaining for wages and benefits on behalf of their respective collective

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[4] "Exclusive representative" is defined in Pennsylvania law as "the employe organization selected by the employes of a public employer to represent them for purposes of collective bargaining." 71 P.S. § 575(a).

bargaining units, contradicting, in part, the so-called "free rider" justification noted in *Abood* and relied upon by the unions to support their collection of compulsory union fees. Second, Amici highlight Pennsylvania law and collective bargaining agreement provisions between public-sector unions and employers belying the unions' argument that they *must* receive compelled union fees from nonmember bargaining unit employees in order to fund collective bargaining efforts.

ARGUMENT

I. Nonmembers Should Not Be Compelled to Financially Support Those Political Collective Bargaining Positions with Which They Disagree

This Court has for decades acknowledged that public-sector collective bargaining is a political activity. *See Harris v. Quinn*, 134 S. Ct. 2618, 2632 (2014) ("In the public sector, core issues such as wages, pensions, and benefits are important political issues . . . ."); *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 310 (2012) ("[A] public-sector union takes many positions during collective bargaining that have powerful political and civic consequences"); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520 (1991) ("The dual roles of government as employer and policymaker in such cases make the analogy between lobbying and collective bargaining in the public sector a close one."); *Abood*, 431 U.S. at 228 ("[D]ecisionmaking by a public employer is above all a political process."). This Court

has further recognized the "impingement on first amendment rights" produced by the compulsory union fees scheme permitted by *Abood*. *Knox*, 567 U.S. at 310–11 (citing *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 455 (1984)). Yet *Abood* justified compulsory union fees, in part, based upon a so-called free rider rationale. *See Harris*, 134 S. Ct. at 2631. Said justification rests on dubious grounds. *See Knox*, 567 U.S. at 311 (discussing the free rider concept as a justification for compulsory union fees this Court noted that "free-rider arguments . . . are generally insufficient to overcome First Amendment objections"). Indeed, "the free-rider argument as a justification" for compulsory union fees is "something of an anomaly." *Id.*

Despite the flawed underpinnings of the free rider rationale, public-sector unions have embraced the justification. *See, e.g.*, Br. in Opp'n for Resp't Am. Fed'n of State, Cty., & Mun. Emps., Council 31 ("AFSCME Opp'n Br.") 4, 19, 22–23 (Aug. 11, 2017). Unions assume that these so-called free-riding nonmembers,[5] like the unions, support raising wages

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[5] The "free rider" classification is misleading. In Pennsylvania, where Amici are employed as public-school teachers, a nonmember employed in a collective bargaining unit with an exclusive representative is actually a "forced rider." He or she is compelled to accept the representation of the exclusive representative and its affiliate unions even though the nonmember has chosen to resign from union membership or never join the union. *See* 71 P.S. § 575(a) (see "Exclusive representative" definition). Despite their attempt to disassociate from the union, nonmembers must

and expanding benefits but simply do not want to pay for a union's representation. *See AFSCME Officers Handbook: A Guide for Local Union Leaders* 72 (last updated Dec. 2012), https://m.afscme.org/news/publications/afscme-governance/pdf/Officers-Handbook.pdf, (last visited Dec. 2, 2017) (defining a "free rider" as a nonmember who benefits from wages and working conditions in a contract negotiated by a union); *Collective Bargaining*, Pa. State Educ. Ass'n, https://www.psea.org/for-members/member-resources2/collective-bargaining/ (last visited Dec. 2, 2017) (noting that the absence of fair share fees "forc[es] local associations to provide union representation for free" to nonmember employees); George A. Sundstrom, *A union member's response: Your vote is your voice in your union: Use it*, Duluth News Tribune (July 16, 2017, 5:59 p.m.), http://www.duluthnewstribune.com/opinion/4298418-union-members-response-your-vote-your-voice-your-union-use-it (retired union member accusing nonmembers who do not pay union dues but who are

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accept union representation on any matters subject to collective bargaining, which often include central employment matters such as wages, benefits, and working conditions, 43 P.S. § 1101.701. The misleading name "free rider" is an attempt by the unions to justify their infringement of nonmembers' First Amendment rights, and protect the unions' ability to force non-members to pay for the very politics to which they object and from which they have fled.

forced to "draw[ ] union-negotiated wages and benefits" "freeloaders" and "leeches").

Contrary to unions' assumption, Amici disagree with certain collective bargaining positions championed by the unions that they have been forced to accept. For instance, during a past contract negotiation period between his union and school district employer, Mr. Hartnett asked the union to refrain from negotiating for an increase to teacher salaries. Mr. Hartnett's request was borne out of concern that another round of teacher salary increases would lead to further financial distress for the school district and inevitable tradeoffs, including fewer resources for the students, possible school district consolidations or job loss, and additional hardships, such as increased school taxes on his community and neighbors. His suggestion to refrain from bargaining to increase teacher salaries, however, was immediately dismissed by union officials.

Mr. Brough and Ms. Galaska oppose their unions' collective bargaining positions regarding medical benefits. Both feel it unfair that they pay so little for their medical insurance, premiums of which are subsidized by the public, while their taxpayer friends and neighbors often pay substantially more for their own medical insurance. Yet their exclusive representatives bargain to keep teachers' contributions to health insurance as low as possible.

Amici's examples are illuminating in that they highlight one of *Abood*'s many problems: nonmembers

are still forced to support a union's political positions and activities, even those with which they disagree and, in certain instances, vehemently oppose. The unions' rhetoric that nonmembers universally support their bargaining positions but want to avoid paying for this representation is patently false. This Court should favor protecting nonmembers' First Amendment rights and offer a non-impinged off-ramp to those who disagree with their compelled representatives' political activities and positions.

II. Public-Sector Unions Do Not Need Compulsory Union Fees to Fulfill Their Exclusive Representative Duties as Exemplified by Their Actions in Pennsylvania

Unions often claim that, to perform their exclusive representative duties, they must collect compulsory union fees from bargaining unit nonmembers. *See, e.g.*, AFSCME Opp'n Br. 2 (Aug. 11, 2017). As this Court has noted, however, a "union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked." *Harris*, 134 S. Ct. at 2640. If it were true that unions could only perform their exclusive representative functions when able to collect fees from nonmembers, they would be forced to abandon organizing and operating in those environments that prohibit collection of compulsory union fees; yet, they have not taken that action. *See id.* (noting that nonmember federal employees cannot be compelled to pay union fees, yet unions continue to function as exclusive representatives for federal employee bargaining units).

Furthermore, the actions of public-sector unions in Pennsylvania highlight that they are not relying on compelled fees to operate as exclusive representatives. First, Pennsylvania law[6]—like Illinois law[7]—does not make compulsory union fees automatic when a public-sector union is an exclusive representative. A union acting as an exclusive representative in Pennsylvania must take the additional step to negotiate a compulsory union fee provision into a collective bargaining agreement. 71 P.S. § 575(b). This has not, however, dissuaded public-sector unions from seeking to unionize the Pennsylvania public-sector workforce. Furthermore, the absence of available compulsory union fees has not proven to be a problem for over twenty-one percent (21%) of unions acting as the exclusive representatives for Pennsylvania public-school teacher bargaining units where union fees have not

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[6] 43 P.S. § 1102.3 ("If the provisions of a collective bargaining agreement so provide, each nonmember of a collective bargaining unit shall be required to pay to the exclusive representative a fair share fee."); 71 P.S. § 575(b) ("If the provisions of a collective bargaining agreement so provide, each nonmember of a collective bargaining unit shall be required to pay to the exclusive representative a fair share fee.")

[7] 5 Ill. Comp. Stat. 315/6(a) ("Employees may be required, pursuant to the terms of a lawful fair share agreement, to pay a fee which shall be their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment . . . .").

been authorized. *See* Commonwealth Foundation Policy Memo, https://www.commonwealthfoundation.org/docLib/20160815l_SchoolDistrictContractPolicyMemo2016.pdf (last updated Aug. 1, 2016). These local unions willingly continue to function as the exclusive representative for union members and nonmembers without collecting compulsory union fees.

Second, certain public-sector unions acting as the exclusive representatives for bargaining units have negotiated for compulsory union fees, but have limited themselves to receiving those fees in only certain instances. For example, in current collective bargaining agreements entered into by public-sector unions Elizabethtown Area Education Association,[8] Juniata County Education Association,[9] Lebanon Education Association,[10] and Penn Manor Education Association,[11] the unions must gain a ninety percent (90%)

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[8] Collective Bargaining Agreement between the Elizabethtown Area Bd. of Sch. Directors & Elizabeth Area Educ. Ass'n July 1, 2017–June 30, 2020, at part VIII.

[9] Negotiated Agreement between the Juniata Cty. Sch. Dist. & Juniata Cty. Educ. Ass'n July 1, 2015–June 30, 2020, at art. V(E).

[10] Collective bargaining Agreement between the Lebanon Sch. Dist. & Lebanon Educ. Ass'n July 1, 2016–June 30, 2019, at art. 4.3.

[11] Negotiated Agreement between the Penn Manor Sch. Dist. & Penn Manor Educ. Assoc. July 1, 2017–June 30, 2021, at part XXX.

union membership rate before they can collect compulsory union fees. The Moon Area Education Association PSEA/NEA[12] has agreed to a collective bargaining provision whereby it must achieve a ninety-five percent (95%) union membership rate before it can collect compulsory union fees from nonmembers. The Ephrata Area Education Association[13] has agreed to an eighty-eight percent (88%) floor for collecting compulsory union fees, while Lampeter-Strasburg Education Association,[14] Manheim Township Education Association,[15] Warwick Education Association,[16] and the West Shore Education Association[17] have all agreed to provisions whereby they will not collect compulsory union fees unless bargaining unit union membership rates are eighty-five percent (85%) or more. If it was

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[12] Agreement between the Moon Area Sch. Dist. & Moon Educ. Ass'n PSEA/NEA 2016–2021, at art. XXXI(G).

[13] Negotiations Agreement between the Ephrata Area Sch. Bd. & Ephrata Area Educ. Ass'n July 1, 2015–June 30, 2018, at art. XIV(14.6).

[14] Lampeter-Strasburg Sch. Dist. Collective Bargaining Agreement July 1, 2015–June 30, 2019, at app. F(C).

[15] Collective Bargaining Agreement between the Manheim Twp. Sch. Dist. & Manheim Twp. Educ. Ass'n July 18, 2014, at art. XII(9).

[16] Collective Bargaining Agreement between the Warwick Sch. Dist. & Warwick Educ. Ass'n July 1, 2016–June 30, 2020, at art. XII(F).

[17] Collective Bargaining Agreement between the West Shore Sch. Dist. & West Shore Educ. Ass'n 2014–2020, at art. II(2.04).

true that collecting compulsory union fees from nonmembers was essential to performing the role of exclusive representative, unions would not agree to the aforementioned union membership rate requirements. If anything, low membership rates should make fair share fees significantly *more* important to the unions. By not insisting on compulsory union fees until union membership rates are sufficiently high, the unions are admitting that they can operate in the absence of union fees. The truth is, unions do not need to collect compulsory union fees in order to fulfill their exclusive representative duties.

CONCLUSION

The long-permitted impingement upon nonmembers' First Amendment rights permitted by this Court's holding in *Abood* must end. This Court should reverse its holding in *Abood*.

Respectfully submitted,

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